STATE OF IOWA
BEFORE THE PUBLIC EMPLOYMENT RELATIONS BOARD

OTTUMWA ASSOCIATION OF PROFESSIONAL FIRE FIGHTERS, LOCAL 395, INTERNATIONAL ASSOCIATION OF PROFESSIONAL FIRE FIGHTERS, Complainant,	)	
and	)	CASE NO. 6294
CITY OF OTTUMWA, Respondent.	)	

DECISION ON APPEAL

This matter is before us on Complainant's appeal from a proposed decision and order issued by an administrative law judge (ALJ) of the Public Employment Relations Board (PERB or Board). The Ottumwa Association of Professional Fire Fighters, Local 395, International Association of Professional Fire Fighters (the Association) appeals from the ALJ's determination that the City of Ottumwa did not commit a prohibited practice within the meaning of Iowa Code section 20.10 by unreasonably delaying grievance procedures, refusing to strike lists of grievance arbitrators, refusing to schedule grievance arbitration hearings, and refusing to supply information to the Association.

Pursuant to PERB subrule 621-9.2(3), we have heard the case upon the record submitted before the ALJ. Oral arguments were presented to the Board by Jack Reed for the Union and Renee Von Bokern for the City. The Union filed a brief in support of its position on appeal.

Pursuant to Iowa Code section 17A.15(3), in this appeal we possess all powers which we would have possessed had we elected,

pursuant to PERB rule 621-2.1, to preside at the evidentiary hearing in the place of the ALJ.

Based upon our review of the record, and having considered the parties' oral arguments and briefs, we make the following findings of fact and conclusions of law.

FINDINGS OF FACT

The Association represents a bargaining unit of fire fighters and related employees of the City of Ottumwa. At all times relevant hereto, the Association and the City were parties to a collective bargaining agreement effective July 1, 1997 through June 30, 2001. The contract contained a grievance procedure which concluded with binding arbitration, and stated the purpose of the procedure as being ". . . to settle all grievances between the parties as quickly as possible, so as to ensure efficiency and promote the employees' morale."

Jack Reed has represented the Association for some time and has filed and processed numerous grievances on the Association's behalf without experiencing the type of difficulties complained of in the instant case. Reed and the City have normally selected an arbitrator within about two weeks of receiving a list of arbitrators from PERB.

The collective bargaining agreement contained language dealing with vacation severance payout upon termination of employment, the correct calculation of which has been the subject of a number of grievances. While the Association's complaint

focuses on conduct involving the West, Bacus and Weeks grievances regarding this issue, some background information is helpful.

In 1998, employee Dennis Shepherd filed a grievance disputing the calculation of his vacation severance payout. The grievance proceeded to arbitration before arbitrator Cyrus Alexander. After Alexander issued his decision, the City believed he had used an incorrect calculation which effectively increased the number of vacation hours accrued, and sought clarification of the award from him. The arbitrator did not clarify the decision.

The City subsequently sent the following letter to the Association regarding the Shepherd decision:

> As directed by Arbitrator Cyrus Alexander, the City has sent a check for $1,364.33 to Grievant Dennis Shepherd. The City has paid this amount to comply with the arbitrator's award, but will not use the award as a basis for calculating vacation payouts in the future.
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> * * *
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> The arbitrator based his award on the presumption that vacation is charged off in eight hour increments. That is not the case, and the City will not adjust its established practice of calculating vacation payout upon severance to the arbitrator's invalid formula.

In 1999 another employee, Randy Van Dyke, filed a grievance over the calculation of his vacation payout. The City had calculated Van Dyke's vacation payout the same way it had originally calculated Shepherd's, and not according to the arbitrator's decision in the Shepherd case. In its denial of Van Dyke's grievance, the City stated: "[t]he City does not recognize

Arbitrator Cyrus Alexander's ruling in a previous grievance to be binding . . . ." The Association sought arbitration, claiming that the Shepherd decision was binding based on the contract's language providing for binding arbitration.

Pursuant to the contractual grievance procedure, the Association and the City selected arbitrator Eric W. Lawson to decide the Van Dyke grievance. Lawson issued an award on July 19, 1999, in which he determined that the Shepherd decision was not binding precedent and that the City had correctly calculated Van Dyke's payout.

On September 20, 1999, when Gary West filed a grievance regarding his vacation severance payout, the City's response was that "[t]he issue regarding vacation payout at termination has already been decided by Arbitrator Lawson." Further, the City stated that "[i]t is the City's position that the [West] grievance is not arbitrable." The City refused to strike from the list of arbitrators as required by the contract and refused to proceed to arbitration absent a court order compelling the arbitration.

The Association subsequently filed a petition in the Wapello County District Court seeking a declaratory ruling compelling arbitration of West's grievance. The Association alleged that the City improperly calculated West's vacation severance payout when it did so according to arbitrator Lawson's reasoning in the Van Dyke arbitration rather than the earlier ruling in the Shepherd arbitration decided by arbitrator Alexander. The City resisted,

arguing that arbitrator Lawson's decision in the Van Dyke case was binding, that it, in effect, became part of the contract, and that the City is no longer required to arbitrate vacation severance payout issues due to the "preclusive effect" of Lawson's award in the Van Dyke case. Although Renee Von Bokern was the City's labor relations representative, the City was represented in court by attorney Hugh Cain.

The court issued a decision on August 3, 2000, stating:

> The City claims that the issue of vacation severance payout calculations has already been decided and that arbitrator Lawson's analysis in the Van Dyke arbitration has become a part of the CBA. Therefore, the City claims this issue is no longer arbitrable. But, the Court notes that the CBA contains no express exclusion from arbitration for issues already decided by arbitration. "The absence of an express exclusion supports finding exclusion was not intended." Iowa City Community School Dist. v. Iowa City Educ. Ass'n., 343 N.W.2d 139, 141 (1983). Moreover, "[i]t is for the arbitrator to interpret the relevant provisions of the agreement and determine the merits of the dispute." State v. State Police Officers Council, 525 N.W.2d 834, 837 (Iowa 1994) (hereafter SPOC). Indeed, "the scope of the arbitrator's authority is itself a question of contract interpretation that the parties have delegated to the arbitrator." W. R. Grace and Co. v. Local Union 759, Intern. Union of United Rubber, Cork, Linoleum and Plastic Workers of America, 461 U.S. 757, 765, 103 S.Ct. 2177, 2183 (1983). This delegation of power includes the power to determine whether a prior award is to be given preclusive effect. Trailways Lines, Inc. v. Trailways, Inc., 807 F.2d 1416, 1425 (8th Cir. 1986). Thus, this Court concludes that the CBA between the parties authorizes the arbitration of the present dispute and it is for the arbitrator

> to determine whether and to what extent preclusive effect should be given to the decisions in the Shepherd and Van Dyke arbitrations.

The court directed (in relevant part) that "[t]he pending grievance must be submitted to arbitration" and that "[t]he issue of whether preclusive effect is to be accorded to prior arbitration rulings, is a question for the arbitrator."

On August 11, 2000, Von Bokern wrote to Association representative Reed suggesting the parties ask for a new list of arbitrators from PERB for the West grievance. On August 13 Reed responded that he preferred to use the list that had already been provided, since all the arbitrators on that list were still active. On approximately September 1, 2000, Von Bokern and Reed struck the list, selecting arbitrator Herbert Berman to hear the West grievance. The arbitrator supplied the parties with dates he was available to hear the grievance, and the parties agreed to a hearing on January 24 and 25, 2001. Thereafter, Reed requested a change in the scheduled dates due to a conflict, and the hearing was rescheduled for and held on March 22, 2001.

While the parties were working on scheduling the West grievance, two more grievances were filed by employees Zilba Bacus and Ron Weeks regarding the same contractual vacation severance payout language at issue in the West case. The Bacus grievance was filed September 12, 2000, and the Weeks grievance was filed October 5, 2000. Following the filing of the Bacus grievance, Reed sent a letter to the City dated September 29,

2000, proposing that the parties discuss the possibility of combining all of the "past, current, and future" grievances dealing with the vacation severance payout issue, but indicating that, until then, Reed would be requesting from PERB a list of arbitrators to hear the Bacus grievance.

When the City received a list of arbitrators for the Bacus grievance, it became apparent that Von Bokern and the Association had differing interpretations of the court's decision in the West matter, as indicated by correspondence between Von Bokern and Reed. On October 17, 2000, Von Bokern wrote:

> The City will not proceed to strike a list of arbitrators in the Bacus grievance. Until the question of whether and to what extent preclusive effect should be given to previous arbitration awards relating to vacation payout is resolved, the City will not arbitrate any new grievances relating to vacation payout at termination. The City will not arbitrate this issue every time an employee retires from City service. To do so would be costly and inefficient, and was not required by the Court's ruling.
>
> The question of the preclusive effect of a previous award is a question of arbitrability. The judge's ruling did not dispose of or settle the issue of arbitrability. Instead, the judge ruled that the question of arbitrability should be determined by an arbitrator. In keeping with the judge's ruling, the issue before Arbitrator Berman will be whether the West grievance is arbitrable.
>
> The Court directed the parties to proceed to arbitrate the West grievance, not any other grievances. The City has raised the issue of whether the West grievance is arbitrable, and it is for Arbitrator Berman to resolve that issue. You do not have the authority to rule

> on or dismiss the City's arguments about arbitrability. It is still the City's position that the West grievance is not arbitrable. That is still a live issue properly before Arbitrator Berman.

The City was concerned that participating in grievance procedures by striking a list of arbitrators could constitute a waiver of its arbitrability argument, since some arbitrators had so ruled.[1]

On October 24, 2000, Reed responded (in part):

> The court ruling states that "the arbitration language in the CBA, Article 12, Section 3, Step 3, is mandatory and unqualified". The arbitrability of a pending grievance requires two (2) tests (as cited by the court ruling) and our contract bargaining agreement meets both of those tests. The court also noted that "the CBA contains no express exclusion from arbitration for issues already decided by arbitration".
>
> Therefore, the City of Ottumwa is required to strike names for a pending grievance issue until such issue is resolved.

On October 30, 2000, Reed filed a grievance (referred to by the parties as the "no-strike" grievance) regarding the City's refusal to strike names from the list of arbitrators provided for the Bacus grievance. PERB sent the parties a list of arbitrators for the "no-strike" grievance in late November, 2000.

On November 6, 2000, Von Bokern wrote to Reed proposing that the parties resolve all of the pending grievances, including the "no-strike" grievance, by agreeing to consolidate all vacation

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[1] For example, the City cited *Ryder and ATE Management Co.*, 110 LA 329 (Arbitrator Moreland, November 28, 1997).

severance payout grievances for hearing (as Reed had previously suggested), before Arbitrator Berman, who had already been selected to hear the West case. Reed did not respond specifically to this proposal, instead insisting that the City strike names of arbitrators for the additional vacation severance payout grievances before the Association would discuss the idea of consolidating all of the grievances in a single arbitration.

Between November 6 and December 18, 2000, Von Bokern and Reed exchanged a number of letters in which Von Bokern asked Reed for a response to the City's consolidation proposal, since it seemed unreasonable to her to strike additional lists if no additional arbitrators were needed. Von Bokern also noted that the City was not waiving its arbitrability arguments in the Bacus and Weeks grievances. Reed continued to insist that the additional arbitration lists be struck before consolidation would be discussed.[2]

On November 9, 2000, the Association's attorney, Charles Gribble, wrote a letter to Hugh Cain, the attorney who had represented the City in the West court proceeding, insisting that the court's decision required the City to strike the lists and proceed to arbitration on the additional vacation severence payout grievances. Thereafter, Cain apparently advised the City

[2] Reed characterized this exchange of communications as representing the City's attempt to "blackmail" the Association into agreeing to consolidate the grievances for hearing. We reject this characterization. The consolidation suggestion had originated with Reed, and the City appears to have been simply trying to obviate the need for selecting arbitrators if the parties agreed none were needed.

Council on two occasions, in November and early December, that the City should strike the lists of arbitrators for the pending grievances.

On December 18, 2000, having reached no agreement with Reed on the consolidation question and in view of Cain's contacts with the City Council, Von Bokern wrote to Reed agreeing to strike the Bacus and Weeks arbitration lists and proposing dates in January, 2001, to strike the lists. Reed responded on January 2 with the following memo:

> Message: Please let me know what time you are available to strike on Friday morning, January 5th, and where to contact you. Also, please be advised that there are 3 lists that need to be struck, Bacus, Weeks, and the no-strike list dated November 30, 2000.

On January 5, 2001, Reed and Von Bokern selected arbitrators for the Bacus and Weeks grievances as planned, but there is no indication that the parties dealt with or even mentioned the list of arbitrators for the "no-strike" grievance at that time. The parties did not subsequently discuss or meet to strike the list of arbitrators for the "no-strike" grievance, nor did Reed subsequently request any such action. Von Bokern assumed that grievance was resolved, since the City had in fact struck the Bacus and Weeks lists.

During January and early February, 2001, Von Bokern and Reed corresponded regarding scheduling of the Bacus and Weeks hearings. Von Bokern wanted to schedule the hearings for May and June, after receipt of the West award. She insisted that the

West case had to be heard and decided first, since she interpreted the court's ruling in the West matter as meaning that arbitrator Berman would decide the "arbitrability issue" of whether preclusive effect must be given to the prior Van Dyke arbitration award—an issue she believed had to be decided before submission of any of the subsequent cases. Reed resisted any scheduling delay, and disagreed that the hearings had to take place in any particular order.

On February 7, 2001, the Association filed the instant prohibited practice complaint with PERB, alleging the City had committed various prohibited practices by refusing to participate in and/or by unreasonably delaying grievance procedures.

On February 6, 2001, the Association again raised the possibility of consolidating all of the vacation severance payout grievances for hearing, and the parties exchanged correspondence for several weeks regarding proposed terms of any such agreement. On the morning of March 22, 2001, the date set for hearing in the West grievance, the parties agreed to consolidate all of the vacation severance payout grievances for hearing that day before arbitrator Berman. By that time, the number of grievances on the issue had increased to four (including a new "Smith" grievance), and all four grievances proceeded to arbitration before arbitrator Berman, who heard them in a single day.

The Boxx Grievance:

The James Boxx grievance, pertaining to the payment of medical expenses associated with an on-the-job injury, was filed in October 1999. By the fall of 2000, the matter had reached the arbitration stage of the grievance procedure. On September 15, 2000, Reed left a phone message for Von Bokern that the arbitrator list needed to be struck for the Boxx case. Attorney Ann Clark was representing the City in the Boxx case, rather than Von Bokern, and the record is unclear as to when or whether Von Bokern returned this phone message. On September 29, 2000, Reed sent a memo to Janet Richards, the City's human resources director, stating, in part:

> I have still not been contacted by anyone from the city who is handling the Boxx grievance issue. We need to strike arbitrators so that we can schedule a hearing date. Please contact me a (sic) your earliest convenience regarding this matter.

Sometime between September 29 and November 6, 2000, Richards and Reed struck the list of arbitrators and communicated regarding mutually agreeable dates for the arbitration hearing. On November 6, 2000, Richards notified Reed that a number of January dates he had suggested were acceptable to the City, and that she would notify the arbitrator so that a date could be scheduled. On November 14, 2000, Richards wrote to Reed:

> We received your fax today regarding January 8, 2001 as the date available for the hearing . . . . I will contact the City representative and confirm this date for the hearing. In the future please forward any information or correspondence to our

> representative Renee VonBokern, this will save time and eliminate any confusion. You can always cc the City any information that you forward to our representative.

Richard's identification of Von Bokern as the City's representative was in error—Ann Clark was the City's representative for the Boxx case. However, Reed assumed from this letter that Von Bokern was the City's representative for the case.

On January 6, 2001, Clark called Reed to discuss the Boxx grievance hearing set for January 8, 2001, confirming that she was the City's representative for that grievance. Immediately prior to commencement of the hearing on January 8, Reed and Clark informally resolved the grievance and the hearing was canceled.

CONCLUSIONS OF LAW

The Association alleges the City has committed prohibited practices within the meaning of Iowa Code sections 20.10(1) and 20.10(2)(a), (b), (d), (f) and (g) by (in the West, Bacus, Weeks "no-strike," and Boxx cases) refusing to comply with the grievance procedures in the collective bargaining agreement and/or by unreasonably delaying such procedures, and (in the Boxx case) by refusing to supply information needed by the Association to process grievances. Following an evidentiary hearing, the ALJ concluded no prohibited practice had been established and proposed dismissal of the complaint. We concur with the result reached by the ALJ.

I. The West, Bacus, Weeks and "no-strike" grievances.

The Association's claims concerning these grievances stem from the City's position that grievances involving the vacation severance payout issue which were filed following issuance of the Van Dyke grievance award were not arbitrable. The "arbitrability" dispute continued even after issuance of the court decision on that issue, due to differences of opinion as to the proper interpretation of the court's decision.[3]

We have previously determined that a complaint which merely seeks enforcement of a contractual agreement to arbitrate is properly brought in the courts pursuant to Iowa Code section 20.17(5). In *City of Keokuk*, 75 PERB 433, the Board stated:

> Although under the National Labor Relations Act some contract violations have also been found by the National Labor Relations Board to constitute unfair labor practices (*Smith v. Evening News Association*, 371 U.S. 195, 1962), and while in those cases the National Labor Relations Board and the federal courts exercise concurrent jurisdiction (*Charles Dowd Box Co. v. Courtney*, 368 U.S. 502, 1962), enforcement of an agreement to arbitrate has been viewed more strictly as a

[3] We would not interpret the court's decision as did Ms. Von Bokern and believe the Association was understandably frustrated by what it viewed as the City's unreasonable continued refusal to arbitrate even after the court seemingly resolved the arbitrability issue. However, we think some confusion over the court's meaning was caused by the court's continued reference to the arbitrator's duty to determine the "preclusive effect" of a prior award, even after the court rather clearly found the case to be arbitrable in the body of its decision. We think the court was not indicating that the arbitrator was to decide whether arbitral jurisdiction was precluded by the prior award, but rather, whether the arbitrator should exercise his judgment in ruling on the merits of the grievance so as to "preclude" a different result than that reached in the prior award—in other words, that the arbitrator must decide what "deference" or "precedential value" should be given to a prior award. In any event, while Von Bokern's interpretation of the court's decision may have been in error, we think it was based upon the court's unfortunate continued use of the term "preclusive effect."

> contract violation enforceable in the courts. *Textile Workers Union v. Lincoln Mills*, 353 U.W. 448 (1957). This Board believes that the action of the legislature of the State of Iowa, in failing to list contract violations as prohibited practices and in providing in [Iowa Code section 20.17(5)] for enforcement of contracts in the district courts, was intended to follow the scheme of the national act, and leave enforcement of collective bargaining agreements, including orders compelling arbitration, to the exclusive jurisdiction of the courts, except in those cases where a violation of an agreement might also constitute a prohibited practice within the meaning of [Iowa Code section 20.10].

City of Keokuk, 75 PERB 433 at p. 3.

In *IAFF, Local No. 66 and City of Waterloo*, 01 PERB 6283, the Board stated:

> PERB and the NLRB have found that although a prohibited or unfair labor practice involving a violation of the statutory bargaining duty may be established where an employer has repudiated the contractual arbitration provisions and refused to arbitrate cases generally, no such violation is committed when an employer merely challenges the arbitrability of a single case or narrow class of cases. *Page County*, 82 PERB 2004[4]; *Velan Valve Corporation*, 316 NLRB 1273 (NLRB 1995); *Mid-American Milling Co.*, 282 NLRB 926 (NLRB 1987).
>
> There are numerous cases illustrating that actions seeking enforcement of collective bargaining agreements, including orders compelling arbitration, are properly brought in and resolved by the courts, rather than the Board. *See, e.g., State of Iowa v. State Police Officers Council*, 525 N.W.2d 834 (Iowa

[4] The Association cites *Page County* in support of its argument, but that case does not support the Association's position and is distinguishable from the instant case. In *Page County*, the employer refused to arbitrate a grievance because it claimed the contract did not contain a requirement to submit grievances to arbitration. Thus, although the issue arose in the context of a single grievance, the employer was repudiating the negotiated arbitration provisions in the contract, and refusing to arbitrate cases generally.

1994); *American Federation of State, County and Municipal Employees/Iowa Council 61 v. State of Iowa*, 526 N.W.2d 282 (Iowa 1995); *Lewis Central Education Assn. v. Lewis Central Community School District*, 559 N.W.2d 19 (Iowa 1997).

Here, there is no evidence which establishes that the City repudiated the contractual arbitration provisions and refused to arbitrate cases generally. As Reed's own testimony established, the parties have followed their grievance procedures with no difficulties in numerous other cases, until the instant dispute arose in the vacation severance payout cases. The Association's claims of unreasonable delays in the processing and scheduling of the West, Bacus, Weeks and "no-strike" grievances constitute claimed violations of the collective bargaining agreement which are properly enforceable in court.

II. The Boxx grievance.

As with the grievances discussed above, the Association alleges the City violated the collective bargaining agreement by unreasonably delaying grievance procedures in this case. The record, however, does not establish that the City's handling of the grievance amounted to its repudiation of the contractual grievance procedures or its refusal to arbitrate cases generally. As noted, many other cases have been arbitrated by the parties without difficulty.

The Association argues that the City committed a prohibited practice by refusing to supply information needed to process the Boxx grievance. The Association alleges that the City

intentionally withheld the identity of the City's representative from the Association until two days prior to the arbitration hearing, thus making an earlier settlement of the grievance impossible.

We find no merit in the Association's argument.

It is well settled that an employer's duty to bargain in good faith encompasses the duty to provide an employee organization, upon request, relevant information needed for contract negotiations or for administration of the contract, including processing of grievances. *Bettendorf-Dubuque Community School District*, 76 PERB 598 & 602; *Southeast Polk Education Assn.*, 78 PERB 1068 (*aff'd*, Polk Co. Dist. Ct. No. CE 9-4816). The duty to supply information does not arise until the union makes a request for or a demand that the information be furnished, *Scott County*, 87 H.O. 3321, and the information requested must be clearly specified. *UNI-United Faculty*, 82 PERB 1988.

Reed did not request information as to the identity of the City's representative. In Reed's September 29, 2000 memo to Janet Richards he simply indicated he had not been contacted by anyone from the City who was handling the Boxx grievance and asked her to contact him to strike the list, which she did. The record does not establish that the City refused to supply requested information to the Association.

Even if we viewed Reed's September 29 letter as a request for information about who was representing the City in the Boxx case, we have concluded that Richard's erroneous identification of Von Bokern as the City's representative was merely an error on her part. There is no evidence that there was any intentional or willful attempt to mislead Reed about this, or that there was any advantage to be gained by the City from such an action.

CONCLUSION

The Association has failed to establish that the City engaged in prohibited practices within the meaning of Iowa Code sections 20.10(1), 20.10(2)(a), (b), (d), (f) or (g) by refusing to comply with grievance procedures and/or unreasonably delaying such procedures in the West, Bacus, Weeks, "no-strike" and Boxx cases. Actions seeking enforcement of contractual grievance procedures are properly brought in district court, not before PERB, and we reach no conclusions on the merits of the Association's contract claims.

The Association has also failed to establish that the City engaged in any prohibited practice within any of the above-cited code provisions by refusing to supply requested information to the Association in connection with the Boxx case.

Based on the foregoing, we hereby issue the following:

ORDER

The prohibited practice complaint filed by the Ottumwa Association of Professional Fire Fighters, Local 395, IAFF, is dismissed.

DATED at Des Moines, Iowa, this 21st day of January, 2003.

PUBLIC EMPLOYMENT RELATIONS BOARD

James R. Riordan

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M. Sue Warner

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